Supreme Court, U.S.
FILED
APR 20 1994
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(2)

No. 93-1520

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Petitioner,

v.

KIMBERLY L. MOODY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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April 20, 1994

Washington, D.C. • THIEL PRESS • (202) 328-3288

25 pp

Question Presented

Should a petition for a writ of certiorari be granted to review a New York State Court of Appeals decision holding that a provision of the Family Support Act of 1988, requiring states to establish child support guidelines as rebuttable presumptions of the correct amount of support to be awarded, preempts state provisions resulting in guidelines which cannot be rebutted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

KIMBERLY L. MOODY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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FREDERICK M. STANCZAK, ESQ.
LEGAL SERVICES OF CNY, INC.

Statement of the Case

Statutory Background

New York State operates a Child Support Enforcement Program under Titles IV-A and IV-D of the Social Security Act of 1935, as amended. This program is based on a scheme of "cooperative federalism". *King v. Smith*, 392 U.S. 309, 316 (1968); *Heckler v. Turner*, 470 U.S. 184, 189 (1985). The federal program reimburses each state which chooses to participate with a percentage of the funds it expends. In return, the State must administer its program pursuant to a state plan that conforms to the applicable federal statutes and regulations.

Pursuant to 42 USC § 602(a)(26), applicants or recipients of public assistance are required, as a condition of eligibility, to assign their support rights to the Department of Social Services. The Department of Social Services then, "on behalf of" the recipient, pursues support from the non-custodial parent. The first $50 per month of any support collected is provided to the recipient over and above their regularly recurring monthly public assistance grant as an incentive for cooperating with the child support unit. Any current support above $50 per month or any arrears are retained by the Department.

Congress, in the Family Support Act of 1988, 102 Stat 2343 § 103 (1988), amended the Social Security Act at 42 U.S.C. § 667 to require that "Each state, as a condition for having its state plan approved under this part, must establish guidelines for child support amounts within the state." Subsection (b) (2) requires that

> There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the state, shall be sufficient to rebut the presumption in the case.

The Department of Health and Human Services promulgated regulations pursuant to the statute providing in pertinent part:

> (a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.
>
> * * * * *
>
> (f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph "a" of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph "a" of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

* * * * *

45 C.F.R. 302.56

The Office of Child Support Enforcement (OCSE) of the United States Department of Health and Human Services, in promulgating these regulations, specifically considered that some states had already adopted standards that did not allow deviations from the guidelines. OCSE said that:

> States have considerable leeway in establishing criteria for rebuttal as long as these criteria are established by the State and take into consideration the best interests of the child. However the absence of any grounds for rebuttal would appear to be inconsistent with the statutory language and the intent of Congress that the guidelines be used as a rebuttable presumption in the establishment of all orders in

> the state. Section 667 does not allow State guidelines which are applied in all cases with no opportunity for rebuttal of the amount indicated in the guidelines. (emphasis added)

56 Fed. Reg. 22348.

The New York State Child Support Standards Act

The New York State legislature enacted the Child Support Standards Act pursuant to the Family Support Act in its 1989 legislative session. L 1989, ch 567. The Act begins by providing that parents, "if possessed of sufficient means or able to earn such means, "shall be required to pay child support as determined pursuant to the guidelines that follow. Family Court Act § 413(1)(a).

Paragraph 413 (1) (c) of the Family Court Act provides for application of guidelines based on a pro rata share of a certain percentage of the combined parental income. "Income", defined at § 413(1)(b)(5), is not to include public assistance, supplemental security income, FICA taxes, or child support or maintenance actually paid to someone outside the household.

Notwithstanding paragraph (c), the Act provides, at paragraph (d) that, where the annual amount of the basic support obligation would reduce the non-custodial parent's income below the poverty income guidelines for a single person as reported by the federal department of health and human services, the basic child support obligation is limited to the greater of 25 dollars per month or the difference between the non-custodial parent's income and the self support reserve (135% of the poverty income guidelines for a single person).

The legislature established criteria or factors at paragraph 413(1)(f) for rebuttal of the presumptive guidelines. Among these criteria is a consideration of the financial resources of the custodial and non-custodial parent and those of the child, Family Court Act § 413(1)(f)(1), and the needs of any children of the non-custodial parent not subject to the instant action if the resources available to support such children are less than the resources available to support the children of the instant action. Family Court Act § 413(1)(f)(8).

However at § 413(1)(g) it provides that in no instance shall the court order child support below twenty five dollars a month, thus creating an irrebuttable presumption that all persons subject to the Act are able to pay $25 per month to support that child.

The provisions of New York's Child Support Standards Act were made a part of the State's plan, which was approved by the federal Department of Health and Human Services, as stated by petitioner. However, the Department has indicated that it is now studying how 413(1)(g) operates and whether, in application, exceptions are ever allowed to determine whether the $25 minimum allows opportunity for showing that such amount is unjust or inappropriate in a particular case in order to rebut the presumption. Presumably, if it finds that there is a conflict with federal requirements for rebuttability, funding of New York's Child Support Enforcement Program will be jeopardized.

Factual Background of the Instant Controversy

Respondent Kimberly Moody has three children. At the time this matter began, in January 1991, two of her children lived with her, and her firstborn son lived with her

mother, Edith L. Clancy. The respondent and all of her children, both custodial and non-custodial, were completely dependent upon the Department of Social Services for assistance, through no fault of the respondent's.

In January 1991, the Oswego County Department of Social Services filed a petition for support on behalf of Edith Clancy. Following a hearing before Hearing Examiner Samuel J. Sugar in September, 1991, the hearing examiner issued an order and findings of fact awarding $0.00 per month in child support. In his decision the hearing examiner found that the respondent's income, pursuant to Family Court Act § 413(1)(b)(5) was $0.00 annually and that her basic child support obligation pursuant to the Child Support Standards Act was 17% of $0.00 or $0.00. He further determined that, since $0.00 income is less than the poverty level, application of the guideline at § 413(1)(g) would set her child support obligation to $25 per month. However, he found that application of this basic child support obligation would be unjust and inappropriate since respondent and her two custodial children were themselves recipients of public assistance. In January, 1992 the Oswego County Family Court, Roman, J., upheld the findings of fact and order of the hearing examiner.

On December 30, 1992 the Appellate Division, Fourth Judicial Department, unanimously affirmed the order and issued a memorandum opinion finding that the Federal Child Support Enforcement Act directly prohibits a state from enacting child support guidelines which permit no rebuttal of the amount awarded, that § 413(1)(g) in effect creates a conclusive presumption that $25 is the correct amount of child support to be awarded regardless of the parent's means and circumstances, and that the provision in the Family Court Act § 413(g) [sic] mandating a $25 minimum award is preempted

under the Supremacy Clause. Rose, Matter of v. Haney, 188 AD2d 999 (4th Dept 1992). The Court ruled that the Family Court, therefore, properly disregarded the minimum award requirement and properly determined that the imposition of a $25 support award would be unjust and inappropriate.

The New York State Court of Appeals affirmed this decision. Rose, Matter of v. Moody, 188 AD2d 1001 (4th Dept 1992), *affd*, __ NY2d __ (December 20, 1993) (Westlaw 1993 WL 522515). It noted that the state's statutory criteria for rebuttal include consideration of the financial resources of the custodial parent, non-custodial parent and child as well as the financial needs of any children of the non-custodial parent not subject to the particular support proceedings. It noted that a comparative resource analysis of the respective support needs of the custodial and non-custodial child who is the subject of the proceeding is also appropriate under the statutory criteria for rebuttal. The Court of Appeals ruled that the mother in this case, having custodial children without resources and in need of public assistance, satisfied these criteria. Petitioner has asserted that the Court of Appeals did not refer to the statutory criteria for rebuttal, but, as can be seen, they consider those criteria.

The Court of Appeals found that Section 667 of the Family Support Act of 1988 gives a non-custodial parent the right to rebut any presumed support amount all the way down to zero and agreed with the Appellate Division that 42 U.S.C. 667(b)(2) directly prohibits a state from enacting child support guidelines which permit no rebuttal and thus preempt, under the Supremacy Clause, the provision in the Family Court § 413(1)(g) mandating a $25 minimum award. (emphasis added.)

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners seek to elevate a simple preemption case into an issue worthy of this Court's exercise of its scarce review resources. They attempt to do this by suggesting that the New York Court of Appeals has not recognized the need to look closely at the intent of Congress in considering whether a provision of the Family Support Act requiring child support guidelines to be rebuttable preempts state provisions establishing a guideline for indigent people which cannot be rebutted.

1. The Court of Appeals Decision is Not in Conflict with any Decision of this Court or of Any Other Court of Appeals Involving Review of State Domestic Relations Clause Under the Supremacy Clause and the Spending Power

The New York Court of Appeals used the proper standard of review in concluding that the provisions of New York's Family Court Act, § 413(1)(d) and (g), establishing a child support guideline of $25 per month for indigent people, which cannot be rebutted, violate the Supremacy Clause, because they conflict with a federal statute that requires all such guidelines to be a rebuttable presumption.

The Supremacy Clause provides that "this consitution and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land...any thing in the constitution or law of any state not withstanding" Art VI cl. 2. Given this, all state provisions which conflict are without effect. See, e.g., *McCulloch v. Maryland*, 4 Wheat 316 (1819); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

The preemption doctrine requires state law to defer to federal legislation where a federal interest is so dominant that it precludes enforcement of state laws on the same subject, where the state policy may produce an inconsistent result with the objective of a federal statute, where compliance with both federal and state regulations is a physical impossibility, or where the law stands as an obstacle to the accomplishment and execution of the full purposes of Congress. *Maryland v. Louisiana*, 451 U.S. at 746-747.

Because family law matters are ordinarily left to the states, this Court has emphasized the necessity to make certain that Congress has intended to preempt state law in this particular area. For example, in *Wetmore v. Markoe*, 196 U.S. 68 (1904), the Court determined that the federal bankruptcy law did not enable the plaintiff to discharge his accrued alimony and child support, because these are in the nature of an obligation between spouses and to children rather than a debt provable in bankruptcy. The Court said:

> Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor, to make the law a means of avoiding the enforcement of an obligation.

Wetmore v. Markoe, 196 U.S. 68, 77.

In *United States v. Yazell*, 382 U.S. 341 (1966), this Court, in deciding that the Small Business Administration could not override the Texas law of coverture to reach a married woman's separate property, said:

> We do not here consider the question of the constitutional power of the Congress to override

> state law in these circumstances by direct legislation or by appropriate authorization given to an administrative authority coupled with suitable implementing action by the agency. We decide only that this court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here.

United States v. Yazell, 382 U.S. 341, 352.

The pertinent question is "whether the right asserted conflicts with the express terms of federal law". *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979). This Court concluded in that case that various provisions of the Railroad Retirement Act did evidence a congressional intent to protect Railroad Retirement Benefits for the beneficiary, and thus prevented the spouse of a beneficiary from considering those benefits as community property under state law.

This Court in *Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 115 L Ed 2d 410 (1991) stated that "Congress may legislate in areas traditionally regulated by the states", but that the provision in question in that case, involving the power of a state to prescribe the qualifications of their own officers, went "beyond an area traditionally regulated by the States" to "a decision of the most fundamental sort for a sovereign entity". *Gregory v. Ashcroft*, 111 S.Ct. at 2400. This Court repeated the need to find that Congress had made its intention unmistakably clear in the language of the statute before deciding that federal law overrides state law, calling this the "plain statement rule", found that it was at least ambiguous whether Congress intended that a state judge be covered by the federal Act in question, and so resolved the

issue in favor of the state.

The instant case is distinguishable from those cited by petitioner in that, unlike *Yazell*, there is federal legislation and in that Congress' enactment in the instant case is far more direct than that in *Wetmore*, *Gregory*, or *Hisquierdo*. Congress clearly is intervening in the area of family law, by requiring states to adopt child support guidelines. Petitioner does not question the right of Congress to involve itself in family law by requiring these guidelines. Congress went further in requiring that all of these guidelines be used by the court as a rebuttable presumption of the correct amount of support to be awarded.

Congress acted here pursuant to its spending power making it an essentially contractual obligation that New York State comply with the provisions of the Family Support Act. This Court has repeatedly upheld the power of the United States to fix the terms upon which its money to the states may be disbursed where it does not have the power to regulate local activities, see *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), even in cases involving the power of a state to prescribe the qualifications of their own officers. See *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), in which the Court upheld the removal of a state highway commissioner who was also chairman of the state Democratic party, where federal highway funds were conditioned upon compliance with provisions of the Hatch Act.

Petitioner mischaracterizes *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973), as standing for stringent preemption principles applying to Aid to Families with Dependent Children programs funded by the federal government. In that case this Court did not find a

clear intent of Congress in enacting the WIN program to terminate all existing state work programs, which the Court saw as complementary. However, it still remanded the question of whether some particular sections of the state work program might conflict with specific provisions of the Social Security Act. Here, Congress has made clear its intent that guidelines be rebuttable presumptions, and the New York State provisions clearly conflict by creating guidelines which cannot be rebutted. In addition, unlike in *Dublino*, the Department of Health and Human Services made clear in the promulgation of its implementing regulations that it recognized that some states had already adopted standards that did not allow deviations from the guidelines and said that Section 667 does not allow State guidelines which are applied in all cases with no opportunity for rebuttal of the amount indicated in the guidelines. 56 Fed. Reg. 22348.

The provision of the Family Court Act at § 413(1)(g) prohibiting a court from ordering support below $25 per month prevents a court from rebutting the $25 guideline found at 413(1)(d) of the Act and prevents other guidelines from being fully rebutted all the way down to zero.

The decision of the New York Court of Appeals found that 42 U.S.C. § 667(b) 2) directly prohibits a state from enacting child support guidelines which permit no rebuttal of the amount awarded, that that provision gives a non-custodial parent the right to rebut any presumed support amount all the way down to zero, and that it thus preempts the provision in the Family Court Act § 413(1)(g) mandating a $25 minimum award.

2. The Decision of the Court of Appeals Ensures that This Court's Decisions Regarding Due Process of Law are Upheld

In enacting the Family Support Act of 1988, Congress had a clear and substantial government interest in ensuring that child support guidelines did not do major damage to due process of law. The mandatory minimum child support provision in New York's Family Court Act violates the due process clause of the United States Constitution.

Under the 14th amendment of the United States Constitution, persons in the respondent's position are protected from a deprivation of property without due process of law. This Court has repeatedly held that statutory provisions which contain irrebuttable presumptions, which operate to deprive a person of a property or liberty interest without due process of law, violate the federal due process clause. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972), (striking that portion of a state's statute which created a presumption that an unwed father is necessarily unfit as a parent); *United States Dept. of Agriculture v. Murray*, 413 U.S. 508 (1973), (holding that Section 5(b) of the Food Stamp Act of 1964, as amended in 1971, which created a presumption that any household which included a person 18 years of age or older and who had been claimed by another person as a dependent for federal income tax purposes during the previous year, would be ineligible for food stamps during the subsequent year, as violative of due process); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), (striking a rule which required pregnant school teachers to take unpaid maternity leave within four to five months of the expected birth date, not withstanding evidence of an ability to continue teaching); *Vlandis v. Kline*, 412 U.S. 441 (1973), (rejecting the statutory rule which created a presumption that certain persons were not "residents" of the state for purposes of qualifying for lower tuition at state funded universities without the opportunity to rebut the presumption).

In *Matthews v. Eldridge*, 424 U.S. 319 (1976), this court held that a balancing test must be applied to questions in which a state statutory provision is alleged to violate the due process clause. The test was stated as follows:

> First, the private interest that will be effected by the official action; Second, the risk of erroneous deprivation of such interest due to the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure would entail.

Id. at 335.

Under the current statutory scheme, New York's Family Court Act operates to deprive a person who lives at or below the subsistence level of $25 per month, regardless of the circumstances which may render that result unjust or inappropriate. Family Court Act § 413(1)(d) and (g). There can be no question but that the deprivation of any income from a person who subsists on welfare benefits is substantial. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970), (recognizing the importance of public assistance benefits to recipients); and *Almanares v. Wyman*, 453 F.2d 1075, 1089 (1971), cert denied 405 U.S. 944 (1972).

Applying the above principles to the present case, it is apparent that New York's scheme of imposing a nonrebuttable $25 minimum award upon persons whose income is below the poverty level violates the due process clause of the United States Constitution. As the Family Court hearing examiner initially noted in this case, the imposition of a $25 award upon

respondent Moody, would have reduced her public assistance benefits by almost 20%, thereby substantially impairing her ability to care for herself and her custodial children.[1] Thus, there can be no question but that, for purposes of the *Matthews v. Eldridge* analysis, there is a substantial private interest at stake. There is also a significant risk that the imposition of the $25 minimum order will be unfair and inappropriate in many cases. This is particularly true within the context of child support orders which, under New York law, cannot be modified or corrected retroactively in favor of the non-custodial parent; See Family Court Act § 451; cannot be discharged in bankruptcy, 11 U.S.C. § 523(a)(5); and can even be collected from Social Security Disability benefits. 42 U.S.C. § 659(a). Further, support payments may be collected by the garnishment of earnings at a rate which is far more severe than that which is allowed for other debts. (Up to 60% of earnings, Civil Practice Law & Rules § 5241). Finally, when such support is sought by the New York State Department of Social Services, it is effective as of the date on which the public assistance began for the child. Family Court Act § 449.

The next step in the *Eldridge* analysis is to consider whether or not there would be any additional burden for the state to provide a hearing in which to rebut the imposition of the $25 minimum order. See *United States Dept. of Agriculture v. Murray*, 415 U.S. 508 (1972). (The presumption of an individual's ineligibility for food stamps held unconstitutional based, in part, upon the relative ease

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[1]It is also important to recognize that the Family Court did not find that any poor person should be excused from the $25 minimum order. Rather, the Court based its decision on the particular circumstances of this case, particularly the fact that respondent Moody has custodial children of her own.

with which individualized determinations could be provided). Clearly here, as in *Murray*, supra, the state incurs no substantial burden whatsoever in providing respondent Moody, or others in her situation, with an opportunity to rebut the presumption that the $25 minimum award is appropriate. Under the statutory scheme, the respondent is already allowed an opportunity for a hearing. Thus, there can be no significant additional burden upon the state. Finally, the government has no interest in obtaining $25 orders against indigent non-custodial parents. As already noted, the state can obtain a fair order, which applies retroactively to the time assistance began for the child, under provisions of the Family Court Act § 440 and § 449. This can be accomplished without the need to impose irrebuttable presumptions such as that contained at § 413(1)(d) and (g) of the Family Court Act.

Finally, it can be inferred from the reading of the Family Support Act that Congress intended to enforce the 14th amendment rights of non-custodial parents by enacting the rebuttable presumption provision found at 42 U.S.C. § 667(b)(2). As this Court noted in *Gregory v. Ashcroft*, _ U.S. ___, 111 S.Ct. 2395 (1991), the Court will find a congressional intent to enforce a constitutional provision through statutory language where the plain language of the statute indicates such an intent. *Id.* at 2404-06. Here, such an intent is plainly stated by the language of § 667(b)(2) itself which flatly prohibits the establishment of irrebuttable presumptions in the setting of child support guidelines. This is the same type of statutory provision which, under the due process clause, has been repeatedly prohibited by this Court. *Stanley v. Illinois*, supra, *Cleveland Board of Education v. LaFleur*, supra, *Vlandis v. Kline*, supra.

Therefore, the congressional prohibition of irrebuttable presumption is not only consistent with but seeks to enforce

the due process rights of respondent Moody, consistent with prior decisions of this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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